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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN W. ROBERTS, et al.,

Petitioner

versus

UNITED STATES OF AMERICA, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Motion under Rule 41(e) of the Federal Rules of Criminal Procedure is proper only if the sole purpose of the Motion is the recovery of property allegedly seized illegally?

2. Whether involuntary compliance with an Internal Revenue Service administrative summons during an appeal challenging the validity of the summons renders the appeal itself moot?

LIST OF PARTIES

The proceeding below was a consolidation of Eleventh Circuit Appeal No. 86-8723 and No. 86-8728. The parties in Appeal No. 86-8723 were the Petitioner, John W. Roberts, and the Respondent, United States of America. The Appellants in Appeal No. 86-8728 were John W. Roberts, Alcovy Properties, Inc.; Alcovy Wood Products, Inc.;

Rocker, Rocker & Roberts, a Georgia general partnership; Southern Forest Products, Inc.; ROMAC Investments, a Georgia general partnership; and Cecil T. Allgood, Inc.* The Appellees in Appeal No. 86-8728 included the United States of America and Randy Taylor, Special Agent of the Internal Revenue Service.

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*For simplicity, all of the Appellants in the consolidated appeals are referred to hereafter as "Roberts" or "Petitioner."

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, through its counsel, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit rendered in the

consolidated appeals on September 2, 1987.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit dated September 2,1987, was not published and is reproduced in the Appendix hereto, as Appendix A. The appeal was a consolidation of Appeal No. 86-8723 and Appeal No. 86-8728.

The Orders of the United States District Court for the Northern District of Georgia, in John W. Roberts, et al. v. United States, et al., Civil Action No. C86-930A, dated June 25 and August 29, 1986, from which Appeal No. 86-8728 was taken, are

reproduced in the Appendix hereto, as Appendix B.

The Orders of the United States District Court for the Northern District of Georgia, in John W. Roberts v. United States, Civil Action No. C86-996A, dated June 25, August 29, September 3, and October 3, 1986, from which Appeal No. 86-8723 was taken, are reproduced in the Appendix hereto, as Appendix C.

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit dated September 2, 1987. The jurisdiction of this Court to review the decision of the Eleventh Circuit is invoked under

the provisions of Title 28 U.S.C., Section 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

1. INTERNAL REVENUE CODE OF 1954
Title 26 United States Code

Section 7602. (a) AUTHORITY TO SUMMON, ETC. - For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized -

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the

business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other date, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7609. (a) NOTICE. -

(1) IN GENERAL. - If -

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which service is made, but no later than the 23rd day before the day fixed in the

summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) SUFFICIENCY OF NOTICE. - Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) THIRD-PARTY RECORDKEEPER DEFINED - For purposes of this subsection, the term "third-party recordkeeper" means -

(A) any mutual savings bank, cooperative bank, domestic building

and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) * * *

(C) any person extending credit through the use of credit cards or similar devices;

(D) * * *

(E) any attorney;

(F) any accountant; and

(G) * * *

(4) EXCEPTIONS. - Paragraph (1) shall not apply to any summons -

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person.

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) NATURE OF SUMMONS. - Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) RIGHT TO INTERVENE: RIGHT TO PROCEEDING TO QUASH. -

(1) INTERVENTION. - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) PROCEEDING TO QUASH. -

(A) IN GENERAL. - Notwithstanding any other law or rule of law, any person who is entitled to a notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) REQUIREMENT OF NOTICE TO PERSON SUMMONED AND TO SECRETARY. - If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A), such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) INTERVENTION: ETC. - Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) SUMMONS TO WHICH SECTION APPLIES

(1) IN GENERAL. - Except as provided in Paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602(a) or under section 6420(e)(2), 6421(f)(2), or 6427(i)(2) and requires the production of records.

(2) EXCEPTIONS. - A summons shall not be treated as described in this subsection if -

(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection (a)(3)(A), or

(B) it is in aid of the collection of -

(i) the liability of any person against whom an assessment has been made or judgment rendered, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) RECORDS; CERTAIN RELATED TESTIMONY. - For purposes of this section --

(A) the term "records" includes books, papers, or other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

(d) RESTRICTION ON EXAMINATION OF RECORDS. - No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made -

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have not been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) SUSPENSION OF STATUTE OF LIMITATIONS. - If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(f) * * *

(g) * * *

(h) JURISDICTION OF DISTRICT COURT; ETC. -

(1) JURISDICTION. - The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceedings brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) * * *

(i) DUTY OF THIRD-PARTY RECORD-KEEPER. -

(1) RECORDKEEPER MUST ASSEMBLE RECORDS AND BE PREPARED TO PRODUCE RECORDS. - On receipt of a summons described in subsection (c), the third-party recordkeeper shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) SECRETARY MAY GIVE RECORD-KEEPER CERTIFICATE. - The Secretary may issue a certificate to the third-party recordkeeper that the period prescribed for beginning a

proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) PROTECTION FOR RECORDKEEPER WHO DISCLOSES. - Any third-party recordkeeper, or agent or employee thereof, making a disclosure of records pursuant to this section in good-faith reliance on the certificate of the Secretary or an order of a court requiring production of records shall not be liable to any customer or other person for such disclosure.

2. OFFICIAL CODE OF GEORGIA, ANNOTATED (O.C.G.A.).

Section 43-3-32. Ownership of accountants' working papers; confidentiality of communications to accountants.

(a) All statements, records, schedules, working papers, computer printouts, computer tapes, and memoranda made by a certified public accountant or public accountant incident to, or in the course of, professional services to clients by such certified public accountant or public accountant, except reports submitted by a certified public accountant or public accountant to a client, shall be and remain the property of such certified public

accountant or public accountant and his partners, fellow shareholders in a professional corporation, or fellow members in a professional association, in the absence of an express agreement between such certified public accountant or public accountant and the client to the contrary. No such statement, record, schedule, working paper, or memorandum shall be sold, transferred, or bequeathed, without the consent of the client or his personal representative or his assignee, to anyone other than one or more surviving partners, fellow shareholders in a professional corporation, or fellow members in a professional association of such certified public accountant or public accountant.

(b) All communications between a certified public accountant or public accountant or employee of such certified public accountant or public accountant acting in the scope of such employment and the person for whom such certified public accountant, public accountant, or employee shall have made any audit or other investigation in a professional capacity and all information obtained by a certified public accountant, public accountant, or such an employee in his professional capacity concerning the business and affairs of clients shall be deemed privileged communications in all courts or in any other proceedings whatsoever; and no such certified public accountant, public accountant, or employee

shall be permitted to testify with respect to any of such matters, except with the written consent of such person or client or such person's or client's legal representative; provided that nothing in this subsection shall be construed as prohibiting a certified public accountant, public accountant, or such an employee from:

(1) Disclosing any data required to be disclosed by the standards of profession in rendering an opinion on the presentation of financial statements or in making disclosure where the practices or diligence of the accountant in preparing, or in expressing an opinion upon, such financial statements are contested;

(2) Disclosing any data where the professional services of the accountant are being contested by or against the client for whom such services were performed or any representative or assignee of such client;

(3) Disclosing any data to other certified public accountants, public accountants, or employees thereof in connection with practice reviews sponsored by professional groups, the purpose of which reviews is to survey such accountant's business practices, audits, and work papers; or

(4) Disclosing any data in a hearing pursuant to Code Section 43-3-30, so long as such data shall be received by the board in camera and shall not be disclosed to the public; and provided, further, that no disclosure provided for in paragraph (1), (2), (3), or (4) of this subsection shall constitute a waiver of the privilege established in this subsection (Code 1933. §84-220, enacted by Ga.L. 1977, P. 1063, §1.)

3. FEDERAL RULES OF CRIMINAL PROCEDURE - RULE 41

* * *

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return if property is made or comes on for hearing in the district of trial after an

indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT OF THE CASE

A. Procedural and Factual Background.

Petitioner Roberts retained the services of Keith Chaple and Abra Ward, d/b/a Chaple and Ward (hereinafter "accountants") in their capacity as professional accountants to handle all of the accounting matters for himself and various business entities in which he was involved for the period from 1980 through December 1985. An accountant-client relationship, as defined in O.C.G.A. §43-3-32, existed between Roberts and the accountants as a result of their being retained and acting as public accountants for

Roberts throughout that period. During that time, Roberts produced documents and disclosed information in reasonable expectation and in reliance on the accountants' representation and the statutory assurance that the documents and information would remain strictly confidential and would not be disclosed to any person or entity except in conformity with Georgia law.

Sometime late in 1985, the Internal Revenue Service apparently commenced an investigation into Petitioner's federal income tax liability for the years 1981 through 1984. On or about December 5, 1985, Special Agent Randy Taylor of the Internal Revenue Service Criminal Investigation Division appeared at the offices of the Petitioner's account-

ants, with no advance notice or appointment, for the purpose of soliciting and receiving information, documents, and testimony with regard to Petitioner's private business affairs and income tax returns. At that time, no warrant, summons, or other judicial process was issued or served to require the production of any information or documents. Agent Taylor removed documents and information pertaining to Petitioner from the accountants' offices, made copies of the books, records, and other documents, and made notes and took information therefrom. Roberts never authorized such disclosure, copying and notetaking and had no notice whatsoever of the request for this confidential information or the disclosure of the information by the

accountants to the government agent.

On later discovering that the accountants had turned over his confidential information, without his knowledge or consent, Roberts sought and obtained an injunction against the accountants in an action filed on April 11, 1987, in the Superior Court of Rockdale County, in John W. Roberts, et al. v. Chaple & Ward, et al., Civil Action File No. C86-CV-1399. As a result of that hearing, Roberts learned for the first time what items had been disclosed or turned over to the government agent by the accountants. As a result, Petitioner then filed a Motion for Return of Property under Rule 41(e) of the Federal Rules of Criminal Procedure in the United States District Court for the Northern District of

Georgia on April 25, 1986. That Motion alleged that Respondents Randy Taylor and the United States of America used or would use information unlawfully obtained and illegally sezied from the books and records taken from the accountants, and leads, clues, and information obtained therefrom, as the basis for recommending criminal prosecution of Roberts for tax fraud. The Motion sought an order, pursuant to Rule 41(e), directing the return of all originals and copies of private books, records, checks, workpapers, extracts, and notes, and all other property belonging to Roberts or in which Roberts had a possessory interest which were illegally seized by representatives of the United States of America from Roberts' accountants. The Motion

further sought the suppression of these books, records, checks, workpapers, notes, copies, and all clues and leads therefrom, by an order that the Government not be permitted to use the books, records, papers, and other private property illegally taken from the accountants, including the submission of any such evidence to any grand jury and the use of any such evidence at any future trial or court proceeding for any purpose, as expressly provided in Rule 41(e). At the time of the filing of that Motion, and, indeed, even at the time of the filing of this Petition, there has been no criminal complaint, detention, release on bail, arraignment, information, or indictment filed against Roberts.

In response to the Motion for Return of Property, Respondents filed a Motion to Dismiss on June 23, 1986, and on August 29, 1986, the district court entered an Order (Appendix "B") granting the Respondent's Motion. The district court held that Roberts did not have a reasonable expectation of privacy from a search by a federal agent in materials he provided to his accountants since federal courts do not recognize a state-created accountant-client privilege. The district court further held that Internal Revenue Code Sections 7602 and 7609 do not require an Internal Revenue Service agent to issue a summons before requesting permission to review a taxpayer's books and records in the hands of the taxpayer's accountant. Petitioners filed

their Notice of Appeal from this Order with the District Court on September 16, 1986, and the case was docketed with the Eleventh Circuit Court of Appeals as Appeal No. 86-8728.

Shortly after filing the Rule 41(e) Motion for return of property, on May 5, 1986, Roberts filed a Petition to Quash Summonses, naming himself, individually, as plaintiff, and the United States of America, as defendant, in the United States District Court for the Northern District of Georgia. This Petition sought to quash administrative summonses issued by Agent Taylor to the accountants, Chaple and Ward, and to Alcovy Banking Company, one of Petitioner's banks, seeking production of documents relating to Petitioner's tax liability. The summonses issued to

Chaple and Ward were served on April 21, 1986, and sought production of the same documents which had already been seized by Agent Taylor in December 1985. Presumably, these summonses were issued and served by Agent Taylor on the accountants after he became aware of the injunction against the accountants issued by the Superior Court of Rockdale County, preventing any further unlawful disclosures, which was entered on April 17, 1986. Respondent has represented in its brief and its argument in the Court of Appeals for the Eleventh Circuit that these summonses had been complied with in full, and it was apparently this representation that resulted in that Court's conclusion that the appeal as to these summonses was moot.

The basis for the Petition to Quash Summonses was to prevent the Government from acting on information obtained illegally from the accountants by issuing summonses to other parties as a result of that information. The Government filed a "Motion to Dismiss Petition to Quash and Request for Order Enforcing Summonses" on July 2, 1986; and the court below entered an Order on August 29, 1986, dismissing the Petition to Quash and enforcing the summonses. On September 16, 1986, Plaintiff Roberts filed an Application for Stay of Order Enforcing Summonses and filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. On October 3, 1986, the District Court entered an Order denying Roberts' Application for Stay.

The appeal was docketed in the Court of Appeals as Appeal No. 86-8723.

B. The Decision Subject to Review.

In its decision dated September 2, 1987, the Eleventh Circuit held that the denial of the Rule 41(e) Motion by the trial court was not appealable since it was, in part, an attempt to suppress evidence, and that Appeal No. 86-8723 was moot, since the summoned parties had complied with the challenged summonses while the appeal was pending.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals erred in holding that the denial of a Motion under Rule 41(e) of the Federal Rules of Criminal Procedure is not appealable if that motion sought both the return of property and the preventing of the use of that property as evidence in any subsequent judicial proceeding.

In DiBella v. United States, 369 U.S. 121 (1962), this Court established the standard for determining when the denial of a motion for return of property under Rule 41(e) of the Federal Rules of Criminal Procedure would constitute a final order, and thus would be appealable. The DiBella decision has never been overruled by this Court, nor has the Court had occasion to consider the issue since that decision; however, the decision

has been the subject of frequent, and conflicting, interpretation by the federal appellate courts. Petitioner contends that the Court of Appeals for the Eleventh Circuit erred in this case by failing to follow the clear mandate of the DiBella decision.

A. DiBella establishes that a denial of a Motion under Rule 41(e) is appealable if that Motion is one for the return of property and there is no criminal proceeding then in existence.

In DiBella v. United States, supra, this Court considered the appealability of an order denying a pretrial motion under Rule 41(e) to suppress the evidentiary use, in a federal criminal trial, of material allegedly obtained through an unreasonable search and seizure. In both

factual patterns at issue in DiBella, the party moving under Rule 41(e) had been arrested on the basis of either a warrant or a criminal complaint, as a result of which certain property had been seized. In neither case had the moving party been indicted at the time the property was seized, and motions to suppress or for return of property were made in both cases prior to the return of indictments. Both motions were denied by the trial courts, and appeals followed. The Court of Appeals for the Second Circuit held that the denial of the motion was appealable because the motion had been made prior to indictment. In contrast, the Court of Appeals for the Fifth Circuit held that the denial was not appealable because it was an interlocutory order in a

pending criminal case. This Court granted certiorari to review the conflicting decisions and held that "the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability." DiBella, supra, at 131. In attempting to define the parameters of this decision, it was stated:

> When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment - in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof... Only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent. DiBella, supra, at 131-132.

DiBella thus established two prerequisites which must be met before the denial of a Rule 41(e) Motion will be a final order in an independent proceeding subject to appellate review: (1) the motion must be for the return of property, and (2) the motion must not be tied to a criminal prosecution in esse. Both prongs of this test have been subjected to considerable interpretation by the Courts of Appeal, and Petitioner urges that further review by this Court is necessary due to the conflicting interpretations of the DiBella test by the Courts of Appeal.

The first prong of the DiBella test requires that the motion be one for the return of property, rather than a motion seeking suppression of evidence in a criminal proceeding. The Court of

Appeals for the Eighth Circuit noted in In re Grand Jury Proceedings, 716 F.2d 493 (8th Cir. 1983):

> As Rule 41(e) is now written, no motion under that Rule could ever literally comply with the requirement that the motion be "solely for return of property." This is because under the Rule any motion for the return of property is automatically treated as a suppression motion as well. Once the property is ordered restored, the property becomes inadmissible as evidence in judicial proceedings. Id., at 495.

The Court of Appeals for the Eighth Circuit thus has interpreted the word "solely" in the first prong of the DiBella test as requiring an inquiry into whether the primary purpose or essential character of the Rule 41(e) Motion was to obtain the return of the items seized or to obtain a suppression order. By inference, this question, in turn, is to be answered by determining

whether there is a criminal proceeding in existence at the time the order is sought. The Court of Appeals for the First Circuit has also held that the word "solely" requires a determination as to the primary purpose of the Motion. Imperial Distributors, Inc. v. United States, 617 F.2d 892, 895 (1st Cir. 1980). See also, United States v. Premises Known as 608 Taylor Ave., 584 F.2d 1297, 1300 (3rd Cir. 1978).

In contrast, the Court of Appeals for the Fourth Circuit has applied a strict interpretation of the word "solely" in the first prong of the DiBella test. In United States v. Regional Consulting Services, 766 F.2d 870 (4th Cir. 1985), the Court of Appeals suggested that a party seeking return of property could institute an

independent action solely for the return of property, and that, by bringing a Rule 41(e) Motion, "appellants made it clear that they sought more than the return of their property." United States v. Regional Consulting Services, supra, at 873. The Court further stated:

> Plainly, by their actions as well as their motion, appellants sought suppression of evidence. That is enough under DiBella to require that this appeal be dismissed. Id., at 874.

It was apparently this erroneous interpretation of DiBella which the Eleventh Circuit followed in dismissing Petitioner's appeal in the present case.

A more severe split in the Courts of Appeal exists regarding application of the second prong of the DiBella test: that the Rule 41(e) Motion not be

tied to "a criminal prosecution in esse." In attempting to define a "criminal prosecution in esse," the Courts of Appeal for the Sixth, Seventh, Eighth, and Tenth Circuits have held that a Rule 41(e) motion may be appealable even if a grand jury investigation has commenced. Sovereign News Co. v. United States, 690 F.2d 569 (6th Cir. 1982), cert. denied, 464 U.S. 814 (1983); Mr. Lucky Messenger Service, Inc. v. United States, 587 F.2d 15 (7th Cir. 1978); In re Grand Jury Proceedings, 716 F.2d 493 (8th Cir. 1983); Gottone v. United States, 345 F.2d 165 (10th Cir. 1965), cert. denied, 382 U.S. 901 (1965).

In Mr. Lucky Messenger Service, Inc. v. United States, supra, the Court of Appeals for the Seventh Circuit held

that "The motion for return of property is not one tied to a criminal prosecution *in esse* against the movant until the criminal process shifts from the investigatory phase to the accusatory." Id., at 16. Similarly, in *Sovereign News Co. v. United States*, *supra*, the Court of Appeals for the Sixth Circuit concluded that "the mere possibility of a prosecution is too remote to deprive the district court's order of finality." *Id.*, at 571. This approach is consistent with the language in *DiBella* to the effect that a prosecution is *in esse* when there is "outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment." *DiBella*, *supra*, at 131.

In contrast, the Courts of Appeal for the First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits have defined "criminal prosecution in esse" as including pending grand jury proceedings, even when no formal charge has been filed. Imperial Distributors, Inc. v. United States, 617 F.2d 892 (1st Cir. 1980), cert. denied, 449 U.S. 891 (1980); Standard Drywall, Inc. v. United States, 668 F.2d 156 (2nd Cir. 1982), cert. denied, 456 U.S. 927 (1982); United States v. Furrina, 707 F.2d 82 (3rd Cir. 1983); United States v. Regional Consulting Services, 766 F.2d 870 (4th Cir. 1985); United States v. Glassman, 533 F.2d 262 (5th Cir. 1976); DeMassa v. Nunez, 747 F.2d 1283 (9th Cir. 1984). According to the Court of Appeals for the Fourth Circuit,

"The denial of a Rule 41(e) Motion is not a final, appealable order under 28 U.S.C. §1291 notwithstanding the absence of formal criminal charges," United States v. Regional Consulting Services, 766 F.2d 870 (4th Cir. 1985), a conclusion which is contrary to DiBella.

Thus, the Courts of Appeal have reached conflicting decisions regarding both prongs of the DiBella test: (1) how to define when a Rule 41(e) Motion is made "solely" for the return of property, and (2) how to define a "criminal prosecution in esse." Rule 17 of the Supreme Court Rules covers the general considerations governing the standards applied for a review on certiorari. The first consideration listed in Rule 17.1(a) is the follow-

ing: ". . . when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Petitioner urges the Court to grant certiorari in this case in order to resolve the clear conflict among the Courts of Appeal.

B. The Court below erred in its application of the DiBella standard to uncontroverted facts in the record in holding that the denial of the Rule 41(e) Motion in this case was not appealable.

The decision by the Court of Appeals for the Eleventh Circuit in this case is a clear example of how the DiBella test has been erroneously applied by some federal appellate courts. In passing on the Rule 41(e) motion on appeal, the Court of Appeals

made no reference to the two-step analysis required by DiBella; and instead merely noted that the Motion itself as filed in the district court made mention of suppression of the evidence allegedly seized illegally, and dismissed the appeal based entirely on that language.

The court below relied on United States v. Glassman, supra, an earlier decision of the Court of Appeals for the Fifth Circuit prior to its division into the present Fifth and Eleventh Circuits, for the general proposition that a Rule 41(e) motion is appealable only when its sole purpose is to retrieve property and is not in any way an effort to suppress evidence, apparently regardless of the existence or lack of any related criminal proceed-

ing. The court below then held that, "Because this motion falls, at least in part, into the latter category, this Court lacks jurisdiction at this stage to review its denial." Opinion dated September 2, 1987, Appendix A, infra.

As the Court of Appeals for the Eighth Circuit noted in the case of In re Grand Jury Proceedings, supra, no Rule 41(e) Motion can ever be "solely for return of property." As Rule 41(e) is written, a motion for return of property is automatically treated as a motion for suppression as well. The Court of Appeals for the Eleventh Circuit erred by not examining the motion in its entirety and making a determination as to the primary purpose of the motion. Had the Court followed this analysis, it would have found that

the primary purpose was for the return of property.

Petitioner Roberts brought his Rule 41(e) motion after discovering that confidential information had been turned over to the IRS, in violation of IRS regulations and in violation of Petitioner's accountant-client privilege established under substantive Georgia law. (O.C.G.A. §43-3-32) The motion alleged that the government had unlawfully obtained property belonging to Roberts, and he sought an order directing that all originals as well as any copies of his property be returned since they were illegally obtained by the IRS. Finally, Roberts sought the suppression of the use in any later proceeding of all of his property which had been taken, in accordance with the

express language of Rule 41(e).

The primary purpose of Petitioner's Rule 41(e) Motion was the return of property which had been unlawfully obtained by the Government. Roberts argued below that he had a property interest in the information contained in the records, as well as in the actual documents themselves. Thus, Roberts sought the return of any copies made by the IRS, since the information on the copies constituted property belonging to Petitioner. In spite of this clear language seeking the return of property, the Eleventh Circuit found the existence of suppression language in the motion, and, on that ground alone, dismissed the appeal "without passing on the merits of appellants' novel contention." Opinion of

September 2, 1987, Appendix A, infra. The court below clearly misapplied the first step of the DiBella analysis, and the decision should be reversed on the ground above. Based on this decision, no Rule 41(e) Motion would ever be appealable, even if there was never a criminal proceeding in esse, if the moving party requests in his motion both remedies expressly afforded by the Rule: return of the property and an order preventing its use in any subsequent judicial proceeding. If this were the law, then DiBella would be meaningless.

The Court of Appeals also failed to apply the second prong of the DiBella test which requires that a Rule 41(e) motion not be tied to a "criminal prosecution in esse," if it is to be

appealable. Under DiBella, in order for there to be a prosecution in esse, there must be "a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment." DiBella, supra, at 131. Had the Court of Appeals followed the mandate of DiBella in this case and applied the uncontested facts to the second prong of the test, it is clear there was no prosecution in esse at any relevant time. At the time of the trial court's ruling, through the entire appellate process, and even currently, there has been no arrest, no arraignment, no indictment, no information, no grand jury presentment, and no other criminal proceeding commenced against Roberts.

As noted previously, much of the conflict on this issue involves a situation where there is a pending grand jury proceeding and a Rule 41(e) Motion is filed by the subject of that grand jury prior to a formal indictment. A majority of the Courts of Appeal have found that this constitutes a prosecution in esse; however, in this case, there was no pending grand jury proceeding whatsoever and no criminal case of any kind pending or contemplated. As noted by the Court of Appeals for the Sixth Circuit, "The mere possibility of a prosecution is too remote to deprive the district court's order of finality." Sovereign News Co. v. United States, supra. Since the present case was not tied to any criminal proceeding, in esse or other-

wise, the denial of the Rule 41(e) motion was an order in an independent proceeding and was appealable under the mandate of DiBella. Rule 17.1(c) of the Rules of the Court provides that a decision by a federal court of appeals on a federal question in a way which is in conflict with applicable decisions of the Court is one of the character of reasons that will be considered by the Court in exercising its discretion on a writ of certiorari. The denial of appellate jurisdiction by the Court of Appeals was clearly in error under DiBella, and the Court is urged to grant certiorari to review that decision.

II. The Court of Appeals erred in holding that compliance with an allegedly invalid Internal Revenue Service summons during the appeals process made the appeal moot.

Appeal No. 86-8723 of the Consolidated Appeal involved a petition to quash three Internal Revenue Service summonses, one to Alcovy Banking Company, and one each to Abra Ward and Keith Chaple, principals in the firm of Chaple & Ward, Petitioner's accountants. Petitioner sought a Stay of Enforcement of these summonses pending appeal in both the United States District Court and in the Eleventh Circuit Court of Appeals. The United States District Court and the Court of Appeals denied Petitioner's Motions for Stay; however, when the Court of Appeals subsequently rendered its

decision on this appeal, it noted that "The summoned parties complied with the enforcement order while this appeal has been pending," and dismissed that portion of the Consolidated Appeal as moot. 11th Circuit Appeal No. 86-8723 (Sept. 2, 1987), Appendix A. This conclusion apparently was based on Respondent's representations made on brief and on argument that the three summonses had been complied with.

Petitioner maintains that the Eleventh Circuit erred in its decision since Petitioner had taken every step legally available to him to prevent enforcement of the summonses. If the summons issue became moot during the appeal, it was only because the Court of Appeals failed to grant Petitioner's Motion for Stay of Enforcement.

Petitioner asserts that the Court of Appeals should not be able to deprive Roberts of all due process protections simply by refusing to grant a Motion for Stay and then dismissing the appeal as moot because there has been compliance.

Petitioner does not dispute the general rule that a taxpayer may not appeal a district court decision ordering compliance with a summons once the taxpayer has already complied with the summons. In that case, the issue is moot. United States v. Sherlock, 756 F.2d 1145 (5th Cir. 1985); Salkin v. United States, 455 U.S. 1018 (1982). It is also well settled that a third-party custodian of records may not appeal a district court decision ordering compliance with a summons once

the custodian has complied with the summons. United States v. First American Bank, 649 F.2d 288 (5th Cir. 1981); Schwallier v. United States, 450 U.S. 1042 (1981). The rationale for both of these positions is that either the taxpayer or the third-party custodian, as the case may be, who has voluntarily turned over documents pursuant to a summons may not thereafter argue that he had no opportunity to obtain appellate review of the enforceability of the summons, since he could have refused to comply with the summons and then litigated the merits of the summons as a defense to a contempt action brought against either the taxpayer or the custodian.

In contrast, the case below involved a factual situation lying

between these two extremes, since the taxpayer sought to contest compliance by the custodian. Obviously, when a third-party custodian has books and records of the taxpayer which are the subject of an administrative summons, only the third-party custodian, and not the taxpayer, would have the option (but, obviously, not necessarily the inducement) of refusing to comply with the summons and litigating the merits of the summons as a defense to a contempt action against the custodian. Under the holding of the Court of Appeals in this case, the taxpayer himself could never obtain relief if the third-party custodian turns over the taxpayer's records, whether or not the taxpayer had notice.

Petitioner maintains that the Court of Appeals should have followed the decision of Gluck v. United States, 771 F.2d 750 (3rd Cir. 1985), where the Court of Appeals held that the validity of a summons was not moot when a third-party recordkeeper had turned over requested documents pursuant to a summons after a district court had refused to quash the summons or stay the execution of its judgment pending appeal. In the Gluck case, the taxpayer sought to appeal a district court order enforcing a summons after his bank had complied with the summons pursuant to the order. The Internal Revenue Service argued, as the Government argued in the Court of Appeals in this proceeding, that compliance by the third party ended any

controversy between the parties and mooted the taxpayer's appeal, since the relief sought (prevention of compliance with the summons) could no longer be granted. The Court of Appeals for the Third Circuit held that the surrender of the documents to the Internal Revenue Service did not end the controversy between the parties because, if the summons was later found to be illegal, as the taxpayer contended, the Court of Appeals could still fashion a remedy, that being the prohibition of the use of the summoned documents.

The Gluck decision was based on facts almost identical to the facts in the present case. The rationale of Gluck appears to be that compliance with a summons by a third-party custodian should not preclude judicial

review of an illegal summons where the taxpayer has had no other opportunity to prevent compliance. Arguably, Roberts has an even stronger case for review in this situation since a government agent initially took documents from Roberts' accountants without any summons having been issued, and without Roberts' knowledge and consent. Thereafter, and presumably based on those documents, the government agent issued the summonses now at issue, including summonses to the same accountants, seeking the very records whose wrongful seizure Roberts is contesting in the consolidated appeal.

The Court of Appeals sought to avoid the question of whether there was an illegal search and seizure under the circumstances by the procedural device

of declaring the controversy moot, after first refusing to grant Roberts' motion to stay compliance with the summonses, which was filed to avoid that very problem. Assuming the Court of Appeals had considered the issue and found the summonses to be based on the fruits of an unlawful search and seizure, it could have prohibited the use of any information which was taken in violation of Roberts' rights. By dismissing Petitioner's appeal on the procedural grounds, the Court of Appeals effectively sanctioned the continued use of this type of conduct by the Internal Revenue Service in the future.

Even if it is assumed that the Court of Appeals correctly held that the summons issue was otherwise moot,

it should then have considered and applied the exception to the mootness doctrine where a situation is capable of repetition yet otherwise is evading judicial review. That exception applies where, "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." United States v. Arthur Andersen & Company, 623 F.2d 720, 722 (1st Cir. 1980), citing Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

The exception noted in the Andersen decision applies to this case. In Andersen, the Court of Appeals held that the exception, although viable,

did not apply because the defendant accounting firm could have challenged the validity of the summons served upon it by refusing to comply and by litigating the merits of the summons as a defense to a contempt action. In the present case, Roberts had no opportunity to litigate the merits of the summons as a defense to a contempt citation since, initially, no summons was issued and, thereafter, the summonses to the accountants, which were issued not to Roberts but to the third-party custodians, were issued only to "cure" the previous misconduct of the Government. Roberts never had the opportunity to refuse to comply and then litigate the merits of a summons in a subsequent contempt proceeding. Further, it would be unreasonable to

expect Roberts' accountants to resist the summons issued to them and to risk a contempt proceeding, as they had no interest whatsoever in refusing to comply with a summons requiring production of material which had already been produced by them without a summons. Andersen, supra, at 724, citing Perlman v. United States, 247 U.S. 7 (1918).

The complex provisions of the third-party recordkeeper summons rules found in Section 7609 of the Internal Revenue Code (26 U.S.C. §7609) which generally afford a taxpayer the right to contest a summons issued to a record custodian, could have no application here, since the Internal Revenue Service effectively avoided all of these statutory protections by inducing the third party to turn over the

records without a summons, in violation of a state statute; then copying those records; then issuing a summons for the same records; and then successfully arguing that compliance with the summons rendered any judicial review moot.

Since the Government has insisted upon pursuing a policy which Congress expressly rejected in enacting Section 7609, the present situation is capable of repetition; yet the Government is evading judicial review, because its illegal actions were too short in duration to be fully litigated prior to subsequent compliance with the summons by the accountants, who had no interest in resisting and exposing themselves to contempt by refusing to comply. As the Court stated in Perlman v. United

States, supra, at 12-13, "The custodian could hardly have been expected to risk a citation for contempt in order to secure [appellant] an opportunity for judicial review." In short, since Petitioner could not litigate the merits of the summons as a defense to a contempt citation, his only opportunity for judicial review of the summons was in the Court of Appeals, which refused to hear him on the grounds of mootness.

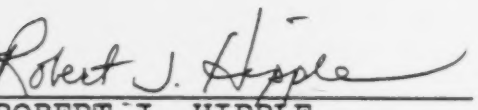
CONCLUSION

In conclusion, Petitioner respectfully requests that the Petition

for Writ of Certiorari be granted.

Respectfully submitted,

ROBERT J. HIPPLE, P.C.



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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8723

JOHN W. ROBERTS,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 86-8728

JOHN W. ROBERTS, ET AL.,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

Appeals from the
United States District Court
for the Northern District of Georgia

(September 2, 1987)

Before HILL and VANCE, Circuit Judges,
and SPELLMAN*, District Judge.

PER CURIAM:

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*Honorable Eugene P. Spellman, U.S. District Judge for the Southern District of Florida, sitting by designation.

No. 86-8723 is an appeal from the district court's order denying a petition to quash three I.R.S. summons and ordering that such summons be enforced. A stay pending appeal was denied by the district court and by this court. The summoned parties complied with the enforcement order while this appeal has been pending. Accordingly, No. 86-8723 is DISMISSED as moot.

No. 86-8728 is an appeal from the district court's denial of a Fed. R. Crim. P. 41(e) motion seeking return of all of appellants' books and records that were turned over to the I.R.S. by appellants' accountants. The uncontradicted assertion of the government establishes that all such records have

been returned, except for a computer printout and a work paper, both generated by the accountant. Appellants insist, however, that they have a property interest in the information contained in the returned records. They urge that they are entitled to an order for the return of all copies made by I.R.S. as well as an order suppressing such evidence and enjoining the government from presenting it to the grand jury or using it in any trial.

It is only when the sole purpose of a Rule 41(e) motion is to retrieve property and not an effort to suppress evidence that its denial is appealable, United States v. Glassman, 533 F2d 262 (5th Cir. 1976). Because this motion

falls, at least in part, into the latter category this court lacks jurisdiction at this stage to review its denial. Without passing on the merits of appellants' novel contention, we therefore DISMISS No. 86-8728.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS, et al.,

Petitioner,

Civil Action

versus

File No. C86-930A

UNITED STATES OF AMERICA, et al.,

Respondent.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that John W. Roberts, Petitioner above-named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the Honorable Charles Moye, granting Respondent's Motion to Dismiss Petitioner's Motion for Return of Property entered in this action on the 29th day of August 1986.

Respectfully submitted, this 12th day of September 1986.

ROBERT J. HIPPLE, P.C.

/s/
ROBERT J. HIPPLE
Ga. Bar No. 357025

/s/
MARINA L. LAO
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Filed in Clerk's Office, U.S.D.C. Atlanta, September 16, 1986, Luther D. Thomas, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS, et al.,

Petitioner,

Civil Action

versus

File No. C86-930A

UNITED STATES OF AMERICA, et al.,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that the within and foregoing Notice of Appeal was served upon counsel for Respondents by depositing a copy of same in the United States Mail, postage prepaid, and properly addressed as follows:

Sharon Stokes, Esquire
Curtis E. Anderson, Esquire
Assistant U.S. Attorney
1800 U.S. Courthouse
Atlanta, Georgia 30335

Elizabeth Sullivan, Esquire
U.S. Department of Justice
Tax Division
Washington, D.C. 20530

With a courtesy copy mailed to:

Bruce Russell, Clerk
The Hon. Charles A. Moye, Judge
United States Courthouse
75 Spring Street
Atlanta, Georgia 30303

This 12th day of September 1986.

/s/
MARINA L. LAO
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ATTORNEY FOR
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS, et al.,

Petitioner,

Civil Action

versus

File No. C86-930A

UNITED STATES OF AMERICA, et al.,

Respondent.

Name of Judge or Magistrate:
CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

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xx Decision by Court. This action came on for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered, GRANTING the defendants'

motion to dismiss,

IT IS ORDERED AND ADJUDGED

that the plaintiffs take nothing, that the action be dismissed and that the defendants UNITED STATES OF AMERICA and RANDY TAYLOR, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE, recover of the plaintiffs JOHN W. ROBERTS, ALCOVY PROPERTIES, INC.; ALCOVY WOOD PRODUCTS, INC.; ROCKER, ROCKER & ROBERTS, a Georgia general partnership; W & R PROPERTIES, a Georgia general partnership; SOUTHERN FOREST PRODUCTS, INC.; ROMAC INVESTMENTS, a Georgia general partnership; and CECIL T. ALLGOOD, INC., their costs of this action.

FILED & ENTERED IN CLERK'S OFFICE THIS
29TH DAY OF AUGUST, 1986
LUTHER D. THOMAS, CLERK

BY: /s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS, et al.,

Petitioner,

Civil Action

versus

File No. C86-930A

UNITED STATES OF AMERICA, et al.,

Respondent.

ORDER

The above-styled action is before this Court on defendants' motion to dismiss or in the alternative, for summary judgment. Plaintiffs initiated these proceedings through a motion for return of property. Whether jurisdiction is predicated on Fed. R. Crim. P. 41(e) or the Court's inherent equitable powers, this Court does have the power to order the suppression or return of

unlawfully seized property prior to the initiation of any civil or criminal proceedings flowing from the seizure. Richey v. Smith, 515 F.2d 1239 (5th Cir. 1975); Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975). The exercise of this so-called "anomalous" jurisdiction is governed by equitable principles. Hunsucker, 497 F.2d at 34. Whether to exercise "anomalous" jurisdiction in a given case is within the sound discretion of the district court. Richey, 515 F.2d at 1243. However, the court should use caution and restraint when deciding to invoke such jurisdiction. Hunsucker, 497 F.2d at 34.

In determining whether jurisdiction is warranted in this case, the

Court should consider: (1) whether the motion accurately alleges that the defendants acted with callous disregard for the plaintiffs' constitutional rights; (2) whether the plaintiffs have an individual interest in and need for the material whose return they seek; (3) whether the plaintiffs would be irreparably injured by denial of return of the property; and (4) whether the plaintiffs' have an adequate remedy at law. Richey 515 F.2d at 1243-44. In the complete absence of any alleged constitutional violation, it is unnecessary to consider the other equitable factors governing the decision to exercise jurisdiction. See Hiller v. Murphy, 600 F.Supp. 14 (N.D. Ga. 1984). In this case the plaintiffs allege that

the defendants violated their fourth and fifth amendment rights.

I. Fourth Amendment Claims

Plaintiffs allege the following facts. Defendant Randy Taylor, Special Agent of the Internal Revenue Service, was assigned to an investigation to determine whether any of the plaintiffs had committed criminal tax violations. In the course of his investigation Taylor went to the offices of plaintiffs' accountants and requested information, documents and testimony regarding the plaintiffs' tax returns and business affairs. Plaintiffs' accountants voluntarily complied with Taylor's request, by turning over books, records, checks and workpapers.

Plaintiffs contend that Taylor did

not obtain a summons, warrant or other administrative or judicial process and, therefore, his conduct was an illegal search and seizure in violation of plaintiffs' fourth amendment rights. A person may contest the legality of a search or seizure only if he or she has a recognizable expectation of privacy in the premises searched or the property seized. See e.g., Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Brown, 743 F.2d 1505 (11th Cir. 1984).

The Supreme Court has said that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases." Couch v.

United States, 409 U.S. 322, 335 (1972) (IRS third party summons issued to taxpayer's accountant).[1] See also United States v. Arthur Young & Co. 465 U.S. 805, 817 (1983). In Couch, the the Supreme Court held that a client cannot reasonably claim, either for fourth or fifth amendment purposes, an

---

1 In Couch, the Court affirmed an IRS summons directed at a taxpayer's accountant seeking production of "[a]ll books, records, bank statements, cancelled checks, deposit ticket copies, workpapers, and all other pertinent documents pertaining to the tax liability of the . . . taxpayer." Couch 409 U.S. at 323. In Couch, as in this case, the IRS agent examined the material requested in the accountant's office with the accountant's permission. This examination took place without notice to the taxpayer and prior to issuance of the IRS summons. Id. at 324.

expectation of protected privacy or confidentiality in materials turned over to his or her accountant. Id. at 336. See also United States v. Centennial Builders, Inc., 747 F.2d 678 (11th Cir. 1984) (taxpayer has no privacy interest in documents turned over to accountant) (summons enforced).

Plaintiffs suggest that Georgia's statutory accountants' privilege provides them with a reasonable expectation of privacy in records turned over to their accountants. See O.C.G.A. §43-3-32. The law is clear in this circuit that Georgia's accountant-client privilege is inapplicable in federal proceedings not involving state law claims. International Horizons, Inc. v. Committee of Unsecured Credi-

tors, 689 F.2d 996 (11th Cir. 1982); Osterneck v. E.T. Barwick Indus. Inc., 82 F.R.D. 81 (N.D. Ga. 1979).

The Court is aware that the cases discussed above can be distinguished because each case involved an IRS administrative summons; however, the pivotal fourth amendment issue: whether the plaintiffs have a recognizable privacy interest in the seized documents is, in the Court's opinion, governed by these cases. The Court finds that the plaintiffs do not have recognizable privacy interest in the material seized and, therefore, they have failed to allege any deprivation of their fourth amendment rights.

II. Fifth Amendment Claims

Plaintiffs claim that, because

they were denied the notice provided by the Service's summons procedure, Taylor's failure to serve an administrative summons before seizing the documents from their accountants violated their fifth amendment rights to due process. Taylor was authorized by Section 7602 of the Internal Revenue Code to proceed in his investigation as follows:

> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summons the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper,

> to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry;
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. §7602(a).

It appears from the language of the statute that an agent may request to examine any books or records which are relevant to his investigation or examination. It is only when the person in possession of the books or records refuses to comply voluntarily with the request that the agent need issue an administrative summons. The agent is not required to issue a summons before examining materials volun-

tarily turned over for examination. See e.g., United States v. Barksdale, 499 F.Supp. 624, 628 (M.D. Fla. 1980); United States v. Ohio Bell Telephone Co., 475 F.Supp. 697, 699 (N.D. Ohio 1978). In plaintiffs' response to defendants' motion to dismiss or, in the alternative, for summary judgment, the plaintiffs argue that Section 7602(a) is a catch-all grant of authority which "cannot vitiate the specific procedures" set forth in Section 7609 relating to summonses issued to third-party recordkeepers. The Court finds the plaintiffs' argument creative, but believes it is contrary to the language of Section 7609. Subsection c of Section 7609 discusses summonses to which the section applies stating "a

summons is described in this subsection if it is issued under paragraph (2) of Section 7602(a) . . . ." 26 U.S.C. §7609(c)(1) (emphasis added). As the Court has stated, it believes an agent is not required to issue a summons where a taxpayer or third-party record-keeper voluntarily complies with the agent's request. Income Tax Regulation §301.7609-1 is in accord with this view:

> [S]ection 7609 does not restrict the authority under section 7602 (or under any other provision of law) to examine records and witnesses without serving a summons and without giving notice of an examination.

The Court does not believe Section 7602 or 7609 requires an agent to issue a summons before the agent requests permission to review a taxpayer's books and records turned over to the taxpay-

er's accountant. Consequently, the Court finds that Agent Taylor's conduct did not violate the plaintiffs' fifth amendment rights.

III. Jurisdiction

In light of the caution and restraint with which this Court should exercise its "anomalous" jurisdiction, and the complete failure of the plaintiffs' allegations of constitutional deprivations, this Court declines to exercise its jurisdiction in this case.

Accordingly, the defendants' motion to dismiss is GRANTED.

SO ORDERED, this 29 day of August 1986.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS, et al.,

Petitioner,

Civil Action

versus

File No. C86-930A

UNITED STATES OF AMERICA, et al.,

Respondent.

ORDER

The petitioners' motion for an expedited hearing is DENIED. The motion for return of property is not ripe for submission until such time as the Government must file a responsive pleading under Rule 12 of the Federal Rules of Civil Procedure (i.e., on or about June 27, 1986). Since the Government has filed a motion to dismiss, the clerk of court is DIRECTED

to resubmit this case when it is ripe or at such time as the petitioners respond to that motion.

SO ORDERED, this 25 day of June 1986.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

Filed in Clerk's Office, U.S.D.C. - Atlanta, June 25, 1986. Luther D. Thomas, Clerk.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8723

JOHN W. ROBERTS,

Plaintiff-Appellant

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

- - - - - - - - -

Appeal from the
United States District Court for the
Northern District of Georgia

- - - - - - - - -

Before GODBOLD, VANCE and JOHNSON, Circuit Judges.

BY THE COURT:

Appellant's motion to stay district court's order of August 29, 1986, is DENIED.

U.S. Court of Appeals, Eleventh Circuit, Filed Dec. 1, 1986, Miguel J. Cortez, Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS,

Petitioner,

Civil Action

versus

File No. C86-996A

UNITED STATES OF AMERICA,

Respondent.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that John W. Roberts, Petitioner above-named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the Honorable Charles Moye, granting Respondent's Motion to Dismiss Petitioner's Motion to Quash Summonses and Respondent's Motion for an Order Enforcing the Summonses against John Martin, Abra

Ward, and Lance Chaple entered in this action on the 29th day of August 1986.

Respectfully submitted, this 12th day of September 1986.

ROBERT J. HIPPLE, P.C.

/s/
ROBERT J. HIPPLE
Ga. Bar No. 357025

/s/
MARINA L. LAO
Ga. Bar No. 438250
ATTORNEYS FOR PETITIONER

ROBERT J. HIPPLE, P.C.
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Filed in Clerk's Office, U.S.D.C. Atlanta, September 16, 1986, Luther D. Thomas, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS,

Petitioner,

versus

Civil Action

File No. C86-996A

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that the within and foregoing Notice of Appeal was served upon counsel for Respondents by depositing a copy of same in the United States Mail, postage prepaid, and properly addressed as follows:

Sharon Stokes, Esquire
Curtis E. Anderson, Esquire
Assistant U.S. Attorney
1800 U.S. Courthouse
Atlanta, Georgia 30335

Elizabeth Sullivan, Esquire
U.S. Department of Justice
Tax Division
Washington, D.C. 20530

With a courtesy copy mailed to:

Bruce Russell, Clerk
The Hon. Charles A. Moye, Judge
United States Courthouse
75 Spring Street
Atlanta, Georgia 30303

This 12th day of September 1986.

/s/
MARINA L. LAO
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PETITIONERS

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS,

Petitioner,

versus

Civil Action

File No. C86-996A

UNITED STATES OF AMERICA,

Respondent.

ORDER

The above-styled action is before this Court on petitioner's motion pursuant to Fed. R. App. P. 8 for stay of this Court's Order of August 29, 1986. Under Rule 8, this Court must consider four factors to determine if the petitioner has made a sufficient showing for a stay of this Court's Order. The Court must consider: (1) whether petitioner is likely to prevail on the

merits on appeal; (2) whether the petitioner has made a showing of irreparable injury is the stay is not granted; (3) whether granting the stay would substantially injure the respondent, and (4) whether granting the stay would serve the public interest. Garcia-Mir v. Meese, 781 F.2d 1450 (11th Cir. 1986); C.f. Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981). Ordinarily, the first factor is the most important. For the petitioner to establish that he is likely to prevail on the merits, this Court must conclude that its Order was clearly erroneous. Garcia Mir, 781 F.2d 1453. The Court believes its Order was correct and, therefore, petitioner's motion must be denied under the ordinary balancing of the

four factors outlined in Garcia-Mir. The balancing of the four factors is most appropriately viewed as a sliding scale. If petitioner demonstrates a lesser possibility of success on the merits and the balance of the equities listed in factors two, three and four tip heavily in favor of petitioner's motion, this Court should grant the stay. d Petitioner has alleged "irreversible and irreparable harm" without further explanation. The Court does not perceive irreparable harm to petitioner and finds that petitioner has failed to establish such harm will result if enforcement of the summons is not stayed. Furthermore, the Court believes the third and fourth factors weigh in favor of denying the stay.

The respondent's investigation would be delayed and the information sought in the summons may be list. "As time passes, memories face, witnesses become unavailable, evidence is lost . . ." United States v. Sweet, 80-1 U.S.T.C. Para. 9262 (M.D. Fla.), aff'd 80-1 U.S.T.C. Para. 9263 (5th Cir. 1980). As to the fourth factor, the Court believes the public interest favors the correct ascertainment and collection of tax liabilities, and consequently weighs against granting the stay.

Accordingly, petitioner's motion for a stay of this Court's Order of August 29, 1986, is DENIED.

SO ORDERED, this 3 day of October 1986.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

Filed in Clerk's Office, U.S.D.C. - Atlanta, Oct. 3, 1986, Luther D. Thomas, Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS,
Petitioner,

versus

Civil Action

File No. C86-996A

UNITED STATES OF AMERICA,
Respondent.

ORDER

The above-styled action is before this Court on petitioner's motion to quash summonses. For the reasons stated in this Court's Order of August 29, 1986, in this case, petitioner's motion is DENIED.

SO ORDERED, this 3 day of September 1986.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

Filed in Clerk's Office, U.S.D.C.-Atlanta, Sep. 3, 1986, Luther D. Thomas, Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS,
Petitioner,

Civil Action

versus

File No. C86-996A

UNITED STATES OF AMERICA,
Respondent.

ORDER

The above-styled action is before this Court on respondent's motion to dismiss petition to quash and request for an order enforcing summonses. The petitioner requests this Court to quash the summonses because the records and testimony sought constitute fruits of an illegal search and seizure.

In a companion action brought by petitioner, John W. Roberts, et al. v. United States of America, et al., No.

C86-930A, this Court discussed the petitioner's allegations that respondent's actions violated his fourth amendment rights. As the Court stated in petitioner's companion case, the petitioner did not have a reasonable expectation of privacy in records and documents in the possession of third parties, including his accountants or bankers and, therefore, there has been no violation of his fourth amendment rights. See e.g., Couch v. United States, 409 U.S. 322, 335 (1972). Accordingly, respondent's motion to dismiss the petition to quash summonses is GRANTED.

The respondent also seeks an order enforcing the summonses in issue. The petitioner's sole objection to the

issuance of this order is that, because respondents violated his fourth amendment rights, such an order would be an abuse of the Court's process. The Court finds that no fourth amendment violations occurred and that the undisputed facts in the pleadings and affidavits establish that the respondent is entitled to an order enforcing the summonses. See United States v. Powell, 379 U.S. 48, 57-58 (1964).

John Martin, Cashier and Vice-President of Alcovy Banking Company, Mansfield, Georgia, is hereby ORDERED to comply with the IRS administrative summons served on him April 14, 1986. Abra Ward is hereby ORDERED to comply with the IRS administrative summons served on him April 21, 1986. Lance

Chaple is hereby ORDERED to comply with the IRS administrative summons served on him April 29, 1986.

In sum, respondent's motion to dismiss petitioner's motion to quash is GRANTED, and respondent's motion for an order enforcing the summonses against John Martin, Abra Ward and Lance Chaple is GRANTED.

SO ORDERED, this 29 day of August 1986.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

Filed in Clerk's Office U.S.D.C. - Atlanta, Aug. 29, 1986, Luther D. Thomas, Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. ROBERTS,
Petitioner,

versus

Civil Action

File No. C86-996A

UNITED STATES OF AMERICA,
Respondent.

ORDER

The petitioner's motion for an expedited hearing is DENIED. The petition to quash is not yet ripe for submission under Rule 12 of the Federal Rules of Civil Procedure. The clerk of court is DIRECTED to resubmit this case at the appropriate time.

SO ORDERED, this 25 day of June 1986.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

Filed in Clerk's Office, U.S.D.C. - Atlanta, June 25, 1986. Luther D. Thomas, Clerk.

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN W. ROBERTS, et al.,

Petitioner

versus

UNITED STATES OF AMERICA, et al.,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that the within and foregoing Petition for a Write of Certiorari was served upon opposing counsel by depositing a copy of same in the United States Mail, first class postage prepaid, and properly addressed as follows:

Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Roger M. Olsen, Esquire
Michael E. Paup, Esquire
Chief, App]ellate Section
Tax Division
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Post Office Box 502
Washington, D.C. 20044
RMO:MLP:WAWhitledge:CNP
5-19-3384

This, the 1st day of December 1987.

Robert J. Hipple

ROBERT J. HIPPLE
Attorney for Appellants

Sworn to and
subscribed before
me:

Lynn Bruce

Notary Public

Notary Public, DeKalb County, Georgia
My Commission Expires Jan. 9, 1990

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-906

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN W. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-906

JOHN W. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals had jurisdiction over his appeals from an order dismissing his action for the return of property and the suppression of evidence and an order enforcing three IRS summonses.[1]

1. As part of an IRS investigation of petitioner, Special Agent Randy Taylor visited the accounting firm of Chapel & Ward, and requested access to documents relating to petitioner. Chapel & Ward voluntarily gave Agent Taylor workpapers, books and other records (Pet. App. B11). The IRS made copies of those documents and returned to the accountants all original documents except a computer printout and a workpaper that belonged to the accountants (*id.* at A3). Petitioner then filed an action in the district court pursuant to Federal Rule of Criminal

[1] Petitioner Roberts was the only appellant in the court of appeals (Pet. App. B1, C2), even though several of his controlled companies were also plaintiffs in the action for the return of property and the suppression of evidence (*id.* at B6).

Procedure 41(e) to have the copies delivered to him and to suppress any use of the information by the IRS. The district court dismissed, holding that petitioner had no legitimate expectation of privacy in the records in the hands of his accountants and that petitioner's constitutional rights had not been violated (Pet. App. B15, B20).

In a separate action brought by petitioner, the district court ordered enforcement of three IRS administrative summonses that required the production of bank records relating to petitioner and required accountants Chapel and Ward to give testimony pertaining to petitioner's tax liabilities (Pet. App. C12-C15). Both the district court (*id.* at C9) and the court of appeals (*id.* at C1) denied motions for a stay of the district court's enforcement order. Before briefs were filed in the court of appeals, all three summoned parties complied with the IRS summonses (*id.* at A2).

The court of appeals dismissed petitioner's two appeals (Pet. App. A1-A4). The court held that it had no jurisdiction over petitioner's appeal from the order dismissing his Rule 41(e) action because an order denying the suppression of evidence is interlocutory. The court dismissed petitioner's appeal from the order enforcing the IRS summonses on the ground of mootness; all summoned parties had complied with the summonses.

2. The court of appeals correctly dismissed petitioner's appeal from the order dismissing his Rule 41(e) action. It is well settled that the dismissal of a Rule 41(e) action is immediately appealable "[o]nly if the [action] is solely for return of property and is in no way tied to a criminal prosecution *in esse* * * *." *Dibella* v. *United States*, 369 U.S. 121, 131-132 (1962). Petitioner's action failed the first part of the two-part *DiBella* test because it sought the suppres-

sion of evidence and was thus not solely for the return of property (Pet. App. A3-A4).

Petitioner maintains (Pet. 31-35) that there is a conflict in the circuits over the precise meaning of the first part of the *DiBella* test. Petitioner notes that some circuits inquire into the motive underlying a Rule 41(e) action to determine whether its "primary" purpose was to obtain the return of property (in which case its dismissal is appealable) or to suppress the government's use of evidence. See, *e.g.*, *United States* v. *Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1300 (3d Cir. 1978). Petitioner contends that these decisions conflict with the Fourth Circuit's opinion in *United States* v. *Regional Consulting Services*, 766 F.2d 870 (1985). The Fourth Circuit, however, recognized no such conflict. It carefully noted in *Regional Consulting Services* that the Rule 41(e) movants in that case did not prove that "the primary purpose of their motion" (766 F.2d at 873 n.6) was the return of records. Thus we believe that no conflict in the circuits has arisen with respect to the first part of the *DiBella* test.

In any event, petitioner's motion under Rule 41(e) specifically requested suppression as a remedy (Pet. 21-22). Petitioner also sought to obtain copies of documents that Agent Taylor obtained from and then returned to Chapel & Ward. But a motion to obtain copies of returned records is nothing more than a motion to suppress the contents of those records. See *Warden* v. *Hayden*, 387 U.S. 294, 305 (1967); *Imperial Distributors, Inc.* v. *United States*, 617 F.2d 892, 895-896 (1st Cir.) (dismissing appeal), cert. denied, 449 U.S. 891 (1980); *Hill* v. *United States*, 346 F.2d 175 (9th Cir.) (dismissing appeal), cert. denied, 382 U.S. 956 (1965). Compare *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983) (denial of Rule 41(e) motion appealable because motion primarily sought return of original documents that were

vital to movant's operation of business). Accordingly, petitioner's Rule 41(e) action was primarily, if not solely, designed to suppress the government's use of evidence. The district court's dismissal of his action therefore was not appealable under any circuit's reasoning.

This case does not present any issue concerning the second part of the *DiBella* test (Pet. 34-48). Petitioner does not challenge the accepted view that the dismissal of a Rule 41(e) action is appealable only if both parts of the test are satisfied. Accordingly, because petitioner's appeal does not meet the first part of the test, the court of appeals properly did not reach the question whether petitioner's Rule 41(e) action was tied to a criminal prosecution.

3. The court of appeals also correctly dismissed as moot petitioner's appeal from the order enforcing the IRS administrative summonses. A case becomes moot when the controversy between the parties ceases to exist so that the court may not grant effective relief. See, *e.g.*, *St. Pierre* v. *United States*, 319 U.S. 41 (1943). In a summons-enforcement proceeding, the government seeks only to obtain access to the summoned information; the party challenging the summons hopes to prevent that access. Once the summoned parties have complied, as in this case, the government has achieved its objective and there is no relief that a court can grant the opposing party. For that reason, all but one of the courts of appeals that have considered the question have held that compliance with an IRS summons renders moot an appeal from an order enforcing the summons.[2]

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[2] See, *e.g.*, *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Trails End Motel*, 657 F.2d 1169 (10th Cir. 1981); *United States* v. *First American Bank*, 649 F.2d 288 (5th Cir. 1981); *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981); *United States* v. *Aquinas College Credit Union*, 635 F.2d 887 (6th Cir. 1980), cert. denied, 450 U.S.

The Third Circuit's decision in *Gluck* v. *United States*, 771 F.2d 750 (1985), is the only contrary circuit authority. In *Gluck*, the Third Circuit reasoned that a case is not moot after compliance with a summons because the court can order the suppression of illegally obtained evidence in any future civil or criminal proceeding. This reasoning is faulty. See *United States* v. *Sherlock*, 756 F.2d 1145, 1147 (5th Cir. 1985). As the Seventh Circuit correctly observed in *United States* v. *Kis*, "[i]t would be highly speculative" to rule on the legality of a summons "for there is no guarantee that the Government will ever seek to use" the summoned evidence (658 F.2d at 533). Thus a ruling on the merits in this case would simply be an "advisory opinion." *Lawhon* v. *United States*, 390 F.2d 663 (5th Cir. 1968) (per curiam). Petitioner may obtain a ruling on the legality of the IRS summonses by way of a suppression motion in the event that there is a future trial.[3] Cf. *United States* v. *Blue*, 384 U.S. 251, 255 (1966).

1042 (1981); *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021 (1980); *United States* v. *Deak-Perera Int'l Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *Barney* v. *United States*, 568 F.2d 116 (8th Cir. 1978); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973). Contrary to petitioner's suggestion (Pet. 51), these decisions are not limited to a case where a taxpayer, as distinguished from a third party, complies with the summons. See, *e.g.*, *United States* v. *First American Bank*, *supra*; *United States* v. *Deak-Perera Int'l Banking Corp.*, *supra*; *Barney* v. *United States*, *supra*.

[3] Under settled precedent, the district court's enforcement order in this case will be vacated because the case became moot before the court of appeals ruled on the merits. Such an order is required "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences[,]" and "clears the path for future relitigation of the issues between the parties." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950); see also *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).

Petitioner's appeal from the order enforcing the IRS summonses does not remain justiciable under the doctrine that claims remain alive if they are "capable of repetition, yet evading review." *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982); see *United States* v. *Kis*, 658 F.2d at 533. First, there is nothing in the record to support a finding that "there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again" (*Murphy* v. *Hunt*, 455 U.S. at 482). Even if new summonses are issued and enforced, the affected parties can obtain full appellate review by obtaining a stay or by means of a contempt citation. See *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1277-1278 (7th Cir. 1984); *United States* v. *Kis*, 658 F.2d at 533; *United States* v. *Sweet*, 655 F.2d 54, 55 (5th Cir. 1981). This Court has recognized that a party's risking contempt may, at times, be the only way to obtain full appellate review of an adverse order.[4] See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). Accordingly, the court of appeals correctly dismissed as moot petitioner's appeal in the summons-enforcement case.

Finally, we believe that this Court's review of the circuit conflict on the mootness question is not necessary at this

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[4] Petitioner cites *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021 (1980), for the proposition that accountants cannot reasonably be expected to risk contempt in a summons-enforcement case (Pet. 60). In fact, the court noted in *Andersen* (623 F.2d at 724) that an accounting firm has a "sufficient incentive" to protect its client's interests because unauthorized disclosures hinder the firm's ability to obtain information. In any event, petitioner's claims can be asserted when evidence is sought to be used against him and provide no basis for interference with the IRS's investigation of third-party records. Cf. *United States* v. *Miller*, 425 U.S 435 (1976); *Couch* v. *United States*, 409 U.S. 322 (1973).

time. As Judge Garth noted in dissent in *Gluck* (771 F.2d at 759-760), the Third Circuit's holding on mootness in that case conflicts with the prior Third Circuit decision in *Vesco* v. *SEC*, 462 F.2d 1350 (1972). Judge Garth has urged that this intracircuit conflict be resolved by the court en banc (771 F.2d at 761). There is substantial summons-enforcement litigation within the Third Circuit, and the government is interested in attempting to persuade that court to agree with the unanimous view of other circuits. Thus, the Third Circuit may well have an opportunity soon to reconsider its mootness rule en banc.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-037/60262

Supreme Court, U.S.
FILED
FEB 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-906

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN W. ROBERTS, et al.,

Petitioner

versus

UNITED STATES OF AMERICA, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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CERTIFICATE OF SERVICE

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NO. 97-906

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN W. ROBERTS, et al.,

Petitioner

versus

UNITED STATES OF AMERICA, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

A. The Government has misconstrued the DiBella test regarding appealability of Rule 41(e) Motions.

The Opposition Memorandum filed by the Government in this action demon-

strates the need for the Court to resolve the inconsistent interpretations given this Court's decision in DiBella v. United States, 369 U.S. 121 (1962) by the Courts of Appeal.

The issue before the Court on the Petition is whether the denial of a motion under Rule 41(e) is an appealable order when there is no criminal proceeding pending. It does not appear to be disputed that a Rule 41(e) Motion is an independent civil proceeding so that a decision on the motion would normally be an appealable order. Thus, in its initial response to the Motion in this case, the Government stated:

> It is clear that this Rule 41(e) motion is not ancillary to any pending criminal proceeding but is an independent civil proceeding. (Defendant's Brief Pursuant to Court's Order of May 22, 1986, p. 3).

The Government then cited United States v. Koenig, 290 F.2d 166 (5th Cir. 1961) and DiBella v. United States, supra, for the proposition that "If there is no criminal proceeding pending, a motion for suppression of evidence and return of such (evidential) property is an independent civil suit." Id. There is an exception to this general rule when there is a criminal proceeding already in existence when a Rule 41(e) motion is filed. In that case, the courts of appeal must determine whether the denial of the motion should still be considered an independent proceeding, from which an appeal will lie, or, instead, as an integral part of the existing criminal trial process. It is in this latter context that DiBella arose, and only in this context that it

should be applied:

> Only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent. (DiBella v. United States, supra, at 131-132)

The lower courts have interpreted this sentence from DiBella as establishing a two-pronged test: (1) the motion must be for the return of property; and (2) the motion must not be tied to a criminal prosecution in esse. See, In Re Grand Jury Proceedings, 716 F.2d 493, 495 (8th Cir. 1983).

The Government's argument in its Opposition Memorandum evidences how the real focus of DiBella has been lost and how some courts are applying DiBella in situations where it was never intended. The Government also argues, with no

apparent recognition of the inconsistency in its argument, that the denial of the Rule 41(e) motion is not an appealable order because it was not an independent proceeding, while stating, at the time the motion was filed, that it was an independent proceeding not ancillary to a pending criminal proceeding, when that position supported its need for additional time to respond to the motion. (Defendant's Brief Pursuant to Court's Order of May 22, 1986).

The Government suggests that "This case does not present any issue concerning the second part of the DiBella test." (Memorandum of Respondent, p. 4). The Government further states that "because petitioner's appeal does not meet the first part of

the test, the court of appeals properly did not reach the question whether petitioner's Rule 41(e) action was tied to a criminal prosecution." (Memorandum of Respondent, p. 4). Thus, the Government argues that the existence of any suppression-type language in a Rule 41(e) motion automatically precludes appeal of a denial of the motion, regardless of whether there was any criminal proceeding in existence, because of the following language: "only if the motion is solely for return of property. . . ." DiBella, supra, at 131. (Emphasis added) Therefore, the Government does not consider the other prong of the DiBella test, which involves whether the motion is tied to a criminal prosecution in esse and which, it is submitted, is the

foundation of the DiBella decision in the first place.

One must examine the context of DiBella in order to crystallize the issue now before the Court. The actual facts of DiBella involved two cases in which the Rule 41(e) movant had been arrested before the motion was filed. The motion sought the return of property which had been seized as part of the arrest process. The Court was concerned with what was, in substance, a suppression motion being appealed when there was a criminal case underway. The Court noted:

> "Presentations before a United States Commissioner, as well as before a grand jury, are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then

fairly in train. DiBella v. United States, 369 U.S. 121, 131 (1969).

In this context, it is clear that the Court was primarily concerned with the disruption of the criminal trial process, which was already underway at the time the Rule 41(e) motion was filed, if an appeal of the Rule 41(e) denial was permitted. It is also clear that if there had been no criminal prosecution underway, then the Court's concern over disruption of the criminal trial process would not have existed. This clear distinction is supported by the fact that Rule 41(e) was amended in 1972, after the DiBella decision. Subdivision (e) now retains only those provisions of the original rule dealing with a motion for the return of property, while the provisions dealing with

motions to suppress have been moved to subpart (f). The final sentence of Rule 41(e), as amended after DiBella, now states: "If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12." This change emphasizes the Court's interest in preventing the disruption of the criminal trial process by a Rule 41(e) motion appeal when the criminal process has already begun, but not otherwise. It is not disputed in this case that no indictment or information had been filed at the time of the motion, and there was no hearing on the motion, despite Petitioner's request for a hearing. Therefore, Petitioner's Rule

41(e) motion could not be construed as a motion to suppress evidence in a pending criminal proceeding. Rule 41(e), as amended, expressly provides that "If the motion [for return of property] is granted, the property shall be restored and it shall not be admissible in evidence at any hearing or trial." Only if the motion is made or comes on for hearing "after an indictment or information is filed," is the motion to be treated as a motion to suppress. Thus, Rule 41(e), by its terms, contemplates precisely the type of motion filed by Petitioner, where no criminal case is pending; and both its denial and the denial of the appeal were in error.

The Government concedes there is no criminal prosecution in esse in this

proceeding. At the time of the trial court's ruling, through the entire appellate process, and even currently, there has been no arrest, no arraignment, no indictment, no information, no grand jury presentment, and no other criminal proceeding commenced against Roberts. Since the present case was not tied to any criminal proceeding, in esse or otherwise, the denial of the Rule 41(e) motion must have been an order in an independent proceeding which was appealable under the mandate of DiBella because it could not be anything else. In reality, the Government argument is that Petitioner should not be allowed to appeal the denial of his Rule 41(e) motion because someday there might be a criminal proceeding against him, and, therefore, someday he

might be able to appeal the denial of his motion when, and if, there is ever an appeal of the hypothetical criminal proceeding. This is not the law; and, to the extent that the decision below reflects this result, it should be reversed.

The denial of appellate jurisdiction by the Court of Appeals was clearly in error, and the Court is urged to grant certiorari to review that decision and to clarify the obvious confusion in the Courts of Appeal regarding the DiBella decision.

B. The Court of Appeals erred by failing to examine the primary purpose of the Rule 41(e) Motion.

Even if the DiBella rationale, as interpreted by the courts of appeal, applied in this case, the court below

erred in its application of that test. As noted in the Petition, some courts of appeal have interpreted the word "solely" in the first prong of the DiBella test as requiring an inquiry into whether the primary purpose of the Rule 41(e) Motion was to obtain the return of the items seized or to obtain a suppression order. Imperial Distributors, Inc. v. United States, 617 F.2d 892, 895 (1st Cir. 1980); United States v. Premises Known as 608 Taylor Avenue, 584 F.2d 1297, 1300 (3rd Cir. 1978); In re Grand Jury Proceedings, 716 F.2d 493, 495 (8th Cir. 1983). The Court of Appeals for the Fourth Circuit, on the other hand, appears to hold that any suppression language in a motion is enough to prevent the motion from being "solely for the return of property."

United States v. Regional Consulting Services, 766 F.2d 870 (4th Cir. 1985), a position seemingly adopted by the Court of Appeals for the Eleventh Circuit in this case. Respondent argues that the Court of Appeals for the Fourth Circuit did, in fact, examine the primary purpose of the motion in Regional Consulting Services, so there is no conflict in the circuits on this point. Apparently, then, Respondent is of the view that all of the courts of appeal require an examination of the primary purpose of the motion.

Even under that interpretation, which Petitioner contends is incorrect, it is clear that the court below did not examine the primary purpose of the motion and, instead, based its decision on the mere existence of suppression-

type language in the motion. Thus, the court below disposed of jurisdiction in this matter in two sentences:

> It is only when the sole purpose of a Rule 41(e) motion is to retrieve property and not an effort to suppress evidence that its denial is appealable . . . Because this motion falls, at least in part, into the latter category, this court lacks jurisdiction at this stage to review its denial. (Opinion dated September 2, 1987).

In one sentence, the Court concluded that the motion had more than one purpose, yet failed to consider the primary purpose of the motion. Apparently, the Eleventh Circuit reasoned that the mere existence of suppression language in the motion automatically foreclosed the possibility of appeal, whether or not a criminal case was then in esse.

If DiBella applies in this proceeding, then the Court of Appeals for the Eleventh Circuit erred by not examining the motion in its entirety and making a determination as to the primary purpose of the motion. As Rule 41(e) is now written, a motion for return of property is automatically treated as a motion for suppression; consequently, based on the decision below, no Rule 41(e) motion would ever be appealable, even if there was never a criminal proceeding in esse, if the moving party requests in his motion both remedies expressly afforded by the Rule: return of the property and an order preventing its use in any subsequent judicial proceeding. If this were the law, then both DiBella and the second half of Rule 41(e) would be meaningless.

CONCLUSION

The decision below is in conflict with similar decisions in the other courts of appeal, is an erroneous application of Rule 41(e) itself, and should be reversed. For the foregoing reasons, it is respectfully requested that the Court grant the Petition for Certiorari to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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NO. 87-906

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN W. ROBERTS, et al.,

Petitioner

versus

UNITED STATES OF AMERICA, et al.,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that the within and foregoing Reply Brief of Petitioner was served upon opposing counsel by depositing three copies of same in the United States Mail, first class postage prepaid, and properly addressed as follows:

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This, the 12 day of February 1988.

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Sworn to and
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My Commission Expires Jan. 3, 1990